

Investment Claims

Transparency and Public Participation: Balancing Investors' Rights and Environmental Interests



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Conflicts have emerged in the recent past between rules fostering foreign direct investment (FDI), and the surge of environmental protection awareness, which resulted in a chain of norms at various levels, aimed at protecting the environment. Examples thereof are the arbitration cases *Vattenfall v Germany I* (settled) and *II* (still pending), where the business' rights to see its investment protected conflicted with host State's right to regulate in the environmental field.

These conflicts can be seen as resulting from the contrast of individual property rights versus collective environmental standards. Or even more pertinently, as a clash between a short-term perspective, emphasizing the immediate benefit, and a long-term perspective, focusing on the availability of economic and technological resources, necessary for bringing an ecosystem to its healthy balance.

Fundamental aspects of environmental law focus on the prevention of harm and risk management, pointing to assessment of the risks connected to a planned human activity, so that irreversible damage and degradation of life-sustaining ecosystems can be avoided.

There is, unmistakably, the need for a correct assessment of an investment project on the territory. On one side, the authorities will need to assess the economic benefits and growth processes that can be generated by a certain activity on the territory where the investment should take place; moreover, they will need to consider the payable tax revenues, both at the local and national level, and therefore take into account the chance to finance economic development. On the other side, it is also necessary to assess the benefits for the environment and public health that can be obtained not implementing those activities.

For this reason, it is crucial to protect the right to property from a misuse of public power, which could breach the investment treaty, denying, for instance, a fair and equitable treatment or causing direct or indirect expropriation; but also to protect people against environmental degradation. Therefore, a balance between environmental effectiveness and the respect of individual economic rights is highly needed.

How to reach a balance of such non coinciding, perhaps counterposed interests? Research and experience have revealed that the best way is through public participation. Both at the national and supranational level, the public should have access to information regarding the environmental measures, hazardous materials and activities present in the territory, and the States should foster public awareness by making the information broadly available.

What is critical is the moment in which public participation takes place. The involvement of civil society actors should not only take the form of *amicus curiae*'s submissions to the tribunal during an investment arbitration, but should also occur during the decision making process on matters regarding the whole civil society, such as environment and public health.

In fact, the Aarhus Convention on access to information, public participation in decision making, and access to justice in environmental matters establishes the rights of individuals and their associations of: access to environmental information, participation in environmental decision-making, and access to justice. The granting of these rights is essential for the full realization of environmental protection. In Article 6, the Convention highlights the time factor, and provides that the public concerned "shall be informed, early in an environmental decision-making procedure, and in an adequate, timely and effective manner", about a project in preparation. The underlying ratio is to enhance transparency, which, in turn, concerns the institutional, regulatory and procedural fields.

The Multilateral Investment Court (MIC) project, proposed by the European Commission, addresses the lack of a unified set of rules on investment dispute resolution. It aims at setting up a coherent, unified and effective system through the establishment of a permanent body, composed by a first instance tribunal and an appeal tribunal, to decide Investor-State disputes.

It is noteworthy to observe that the MIC project enhances and promotes transparency, both from the procedural and the public participation point of view.

In fact, although no legislative text is yet available, its design reveals that it will work transparently, and various instruments were enacted in order to ensure the public participation in the decision-making process. A public consultation was launched and addressed to all stakeholders, who could submit their opinion replying to over 60 questions. Among the latter, it was asked about the possible environmental impacts of the MIC project. In addition, a stakeholder meeting held in Brussels allowed more than 100 organizations to have a live interaction, with questions and immediate replies from the European Commission.

To conclude, designed transparency and public participation in the MIC project reveals the intention of the European Institutions to promote the value of proximity to citizens and protect stakeholders' rights, allowing economic actors and the whole civil society to express their views, with the aim of achieving a better and more solid balance of the different interests.

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